Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE GRAND JURY NO. 94-2

SCOTT A. MCMILLAN

Grand Juror - Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Scott A. McMillan
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TO: The Honorables, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Scott A. McMillan respectfully requests that a Writ of Certiorari issue to review the Judgment of the Ninth Circuit Court of Appeals entered on February 2, 1996.

ISSUES PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals had jurisdiction to entertain petitioner's appeal challenging his exclusion from the Grand Jury and grand jury service?

2. Whether removal of a federal grand juror for political beliefs violates the First Amendment of the United States Constitution?

3. Whether a District Court has jurisdiction, absent juror misconduct, to remove a grand juror after the juror's impanelment?

4. Whether an impaneled grand juror has a liberty interest in serving on a federal grand jury?

5. Whether the Ninth Circuit Court of Appeals had jurisdiction to review the secrecy order entered by the District Court?

PARTIES TO THE PROCEEDINGS

Petitioner Scott A. McMillan was impaneled on Grand Jury 94-2 of the Southern District of California. Following his impanelment he was excluded from service on that grand jury or any subsequent grand jury. The District Court for the Southern District of California has denominated this case as Misc. No. 94-00239-RMB. The Ninth Circuit Court of Appeals denominated this case as 94-55878. Both proceedings in the lower court are filed under seal. Petitioner appears pro se. Respondent is the Government.

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1 Brown P.C. 62, 1 Eng.Rep. 417.

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OTHER AUTHORITY

The Jury Selection and Service act of 1968 (P.L. 90-274) House Report No. 1076, U.S. Code Congressional And Administrative News, Volume 2, 90th Congress 1968 ..... 2, 6

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

A copy of the order from the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed is attached hereto as Appendix B. The order filed by the District Court upon which the appeal to the Ninth Circuit was based is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals dismissing the appeal was entered on February 2, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for redress of grievances."

• • •

The Jury Selection and Service act of 1968 (P.L. 90-274) House Report No. 1076, U.S. Code Congressional And Administrative News, Volume 2, 90th Congress 1968.

• • •

Title 28, United States Code, Section 1861 provides, in part:

> "... It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, ..."

STATEMENT OF THE CASE

In March of 1994, Petitioner received a jury questionnaire from the District Court for the Southern District of California. Petitioner filled out the questionnaire and returned it. In April of 1994, petitioner received an instruction sheet and a summons to appear for jury service. On May 4, 1994, petitioner presented himself at the District Courthouse, and was selected to be a member of federal grand jury 94-2, in the Southern District of California. Petitioner was duly voir dired, impaneled, sworn and charged.

During the voir dire, District Judge Rudi Brewster questioned the jurors on their educational backgrounds, employment, marital status, hobbies, and what they did in their spare time. During the District Court's examination of petitioner, Petitioner answered all questions truthfully, and when asked what he did in his spare time, petitioner stated that he was a "community activist". Neither the Court or the U.S. Attorney's office objected to petitioner's

impanelment. Consequently, Petitioner was sworn by the clerk, and given a charge by the judge. Each member was also given a "Handbook For Federal Grand Jurors".

Petitioner read the "Handbook For Federal Grand Jurors" which provided that:

> "(1) The Grand Jury's Tasks
>
> As stated above, the federal grand jury's function is to determine whether a person shall be tried for a serious federal crime alleged to have been committed within the district where it sits. Matters may be brought to its attention in three ways: (1) by the United States Attorney or an Assistant United States Attorney; (2) by the court that impaneled it; and (3) from the personal knowledge of a member of the grand jury or from matters properly brought to a member's personal attention. In all these cases, the grand jury must hear evidence before taking action." (emphasis added).

On May 12, 1994, Petitioner attended his first and only grand jury meeting during which the government presented testimony from several witnesses. At a break, petitioner requested a subpoena form from a paralegal from the U.S. Attorney's office who was assigned to the jury. The paralegal contacted two assistant United States Attorneys: Charles LaBella, chief of the Criminal division, and Laura Birkmeyer, Chief of the "Intake Unit", to discuss the propriety of a grand juror's request for a subpoena. Both Assistant United States Attorney's were hostile to petitioner's attempt to initiate an investigation. Petitioner requested that the Court be notified of the dispute.

Shortly thereafter, a conference was held in District Judge Rudi Brewster's chambers. Present were petitioner, and AUSA La Bella and Birkmeyer. Petitioner explained that he was following the activities of the U.S. Customs Service by reading the newspaper. Petitioner was specifically concerned with an allegation that the

Customs Service was infiltrated by narcotics traffickers, as depicted in the Reader's Digest, June 1994, entitled "A Whistle-Blower's Ordeal", which detailed Customs' management's involvement in narcotics trafficking in San Diego, California.

Petitioner specifically wanted to investigate allegations made by Mike Horner, an ex-customs agent who was the subject of the article published by the Reader's Digest. Petitioner further provided a case number and contact name within the Department of Justice for other allegations of misconduct which had been reported by U.S. Customs Inspector Kenneth Lakes. The U.S. Attorney's office was opposed to petitioner's initiating an independent grand jury investigation and stated to the District Judge that they intended to brief the Court on the propriety of such an investigation. The U.S. Attorney's office, instead began an investigation of petitioner's activities, and came up with the petitioner's founding and association with the Bivens Legal Action Movement, known in San Diego by its acronym "BLAM"; and petitioner's various protest and litigation activities. Based upon this evidence, the District Court decided that petitioner was biased against the government and therefore should be excluded from Grand Jury service, both immediately and for the "next twenty or thirty years".

The district court noted that none of the incidents petitioner wanted the Grand Jury to investigate were related to petitioner's own disputes with the Government:

> "I have reviewed these papers and I have concluded, at least preliminarily, and I want to hear from counsel -- but it appears to the Court from these papers that the Respondent should be removed, and for three reasons.
>
> He should be removed because there is an implied bias. Second, there is an appearance of actual bias. And third, there is a conflict of interest.
>
> The Government does not claim that the Respondent should be removed because the Respondent brought before Panel 94-2 a request to

investigate the Customs department. Indeed, as the Respondent correctly points out, that was not an inappropriate act on his part. The charge that the Court gives to the grand jurors permits the grand jurors to initiate a request for an investigation of anything or anybody which might be within Federal jurisdiction.

Certainly, an investigation of the United States Customs Office or department in this area is a subject which is within the United States District Court's jurisdiction. So there's nothing inappropriate about a grand juror requesting that the grand jury initiate an investigation.

The difficulty with this particular circumstance is that it appears to the Court, without any factual dispute, that the Respondent is involved in a number of outside, unrelated, totally unrelated, controversies and confrontations with the United States Customs Service."
Transcript June 24, 1994, 8:16-9:16 (emphasis added)

The United States Attorney's office established "proof" of this "bias" with the District Court by relying on the following testimony elicited during a deposition of Petitioner in the course of one of the unrelated controversies referred to above:

> Q - by AUSA Stephen V. Petix: "When you say that there has been a major disruption in your life, what is the disruption that you're talking about? "
> A - by Scott McMillan:"The disruption is the realization that the American Constitution -- that being an American doesn't make me any different than anybody else in the world, because the Government is and the people who work for the Government, a large majority of them are allowed to carry -- to do illegal things, do wrong things, get away with them, and that they are protected because of their status being members of the government

class."

Gov. Mtn. Ex 'C' 260:21-261:6

Petitioner, as of date, has been excluded from participation in grand jury service immediately and for the next "twenty or thirty" years. Following the entry of the District Court's order, Petitioner appealed to the Ninth Circuit Court of Appeals. On February 2, 1996, the Ninth Circuit Court of Appeals entered a curt, one page order dismissing the appeal without prejudice for lack of jurisdiction.

REASONS WHY THE WRIT SHOULD BE GRANTED

Petitioner was picked by random selection from the voter lists which is supposed to "insure that juries will be selected without regard to race, wealth, political affiliation, or any other impermissible criterion." The legislative history of the current jury selection system shows that the Congressional intent is that a juror's qualification requirement is only to be citizenship, age, residence, literacy, health and lawful behavior. Any other reason for disqualification is violative of the congressional intent found in the House Report, page 1795, because prior subjective qualifications have produced discriminatory results.

Congress in the adoption of the Jury Act of 1968, has made it explicitly clear to the judicial and executive branches of government that each and every citizen, who is objectively qualified under the statutory guidelines should have the "opportunity" to serve upon a federal jury. The questions presented are important, as there is no guideline as to when or how a sitting grand juror can be dismissed on grounds other than bad conduct. The Ninth Circuit Court of Appeals in dismissing the petitioner's appeal for equitable relief ignored the historical English common law precedents of implied remedies dating back to Ashby v. White[1], and this Court's previous decisions applying the theory of "implied remedies", see e.g. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct.

[1] Ashby v. White, Court of King's Bench; House of Lords, 1703, 2 Ld.Raym 938, 92 Eng.Rep. 126; 1 Brown P.C. 62, 1 Eng.Rep. 417

1999, 29 L.Ed.2d 619. and the Bivens progeny.

In Bivens, this Court made clear that a federal court has inherent equitable powers and a particular responsibility to assure vindication of constitutional interests. It cannot be denied that petitioner has a liberty interest in serving on federal petit and grand juries, and this liberty interest transcends any governmental perception of bias, based upon mere speculation and conjectures, which in themselves are violative of petitioner's First Amendment right to petition for redress.

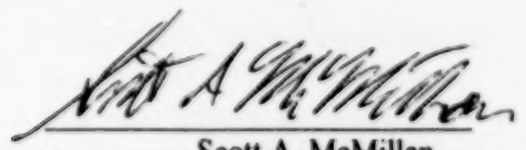
It is also important to note that Petitioner is under an affirmative duty to maintain secrecy as to the underlying dispute in the District Court. The Ninth Circuit Court of Appeals in dismissing the appeal, allowed Petitioner no means of challenging this order absent violating it and seeking relief from the ensuing contempt violation. This is a situation which is totally at odds with our system of checks and balances -- the District Court has been allowed to create a private law which may not be reviewed by a higher court.

Finally, to allow the Government to institute proceedings for the removal of a grand juror following impanelment for reasons of "bias" without allowing the avenue of appeal is an abuse. Secrecy coupled with the unwillingness of the Court of Appeals to exercise its jurisdiction to review the proceedings in the District Court have set a precedent which will end what limited independence that the Grand Jury has traditionally enjoyed.

CONCLUSION

For the foregoing reasons, the Petitioner Scott A. McMillan, respectfully requests that a Writ of Certiorari issue to review the Judgment of the United State Court of Appeals for the Ninth Circuit.

Respectfully Submitted, this 26 day of April, 1996.



Scott A. McMillan
Petitioner, Pro Se

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE GRAND JURY NO. 94-2)	Misc. No. 94-239
)	
)	ORDER
)	
)	FILED UNDER SEAL
)	
)	

On June 24, 1994, the following motions were heard before the Honorable Rudi M. Brewster: (1) the United States' motions to remove Scott A. McMillan from Grand Jury service; (2) the United States' motion to seal all records and proceedings in this matter; (3) Mr. McMillan's motion to order Grand Jury No. 94-2 to reconvene; (4) Mr. McMillan's motion to order the United States Attorney to cease talking with the grand jury foreperson outside the presence of the jury; (5) Mr. McMillan's motion to open all records and proceedings in this matter; and (6) Mr. McMillan's motion to order Laura Birkmeyer, Assistant United States Attorney, to cease talking about Mr. McMillan with officials of United States Customs. Roger W. Haines, Jr., Esq. appeared for the United States; Martha M. Hall, Esq., and Debra Di Iorio, Esq., appeared for Mr. McMillan. Upon consideration of the moving and responding papers and oral argument thereon, the court hereby GRANT the United States' motions, DENIES Mr. McMillan's motion to open all records and hearings, and GRANTS Mr. McMillan's other motions.

I. Motion to Remove Mr. McMillan from Grand Jury Service

Fed. R. Crim. P. 6(g) states, "At any time for cause shown the court may excuse a [grand] juror either temporarily or permanently ...." In its motion to remove Mr. McMillan, the United States relies on two types of "cause," as set forth in 28 U.S.C. § 1866(c). Section 1866(c) states in relevant part, " . . . any person

summoned for [grand] jury service may be ... excluded by the court on the ground that such a person may be unable to render impartial jury service or that his service as a [grand] juror would be likely to disrupt the proceedings."

The United States contends that more than half of the indictments returned by a grand jury panel involve U.S. Customs, either because Customs investigates the matter or because Customs employees testify about the matter before the grand jury. Therefore, the government bases its motion in large part on what it perceives is Mr. McMillan's lack of impartiality as to the Customs service. The United States contends that Mr. McMillan's presence will disrupt the grand jury's proceedings, as it will be necessary to exclude him from all prosecutions involving Customs.

Upon consideration of the briefs submitted and the records on file in this court, the court finds numerous factors which lead it to conclude that there is an implied bias, and appearance of actual bias, and a conflict of interest on the part of Mr. McMillan against the United States Customs Service and possibly other governmental agencies.

The court is most concerned with Mr. McMillan's ongoing RICO litigation against Customs. See McMillan v. Johnson, et al., Southern District of California Civil Case No. 91-1158-IEG(CM). As a sitting juror, Mr. McMillan would have a clear conflict of interest in any proceeding involving Customs or its employees. In addition, in deposition testimony taken in that matter, Mr. McMillan expressed an obvious distrust of Customs and the "government class." See Exhibit C to United States' Memorandum.

This conflict is heightened by at least two forfeiture actions by the United States against property owned by Mr. McMillan's business, Apex Wholesale, Inc., and by Mr. McMillan's attempts to adversely possess property subject to forfeiture by the United States. See United States v. Two KT-386SX-VI 16 CPU Mainboards, Southern District of California Civil Case No. 91-0577-S(BTM); United States v. 20 VGA Cards, Southern District of California Civil Case No. 92-0111-G(POR); United States v. Commercial Real Property and all Buildings and Structures Located Thereon, et al., Southern District of California Civil Case No. 93-0894-GT(POR). As a result of the government's attempts to keep Mr. McMillan off

the property, Mr. McMillan filed a subsequent action for damages. See McMillan, et al. v. Smith, et. al., San Diego Superior Court Civil No. 676336. These cases demonstrate an implied bias and an appearance of actual bias against Customs and possibly other governmental agencies.

At oral argument, Mr. McMillan objected strenuously to the court's consideration of his founding membership in the Bivens Legal Action Movement ("BLAM"), an organization whose members discuss and exchange information about their civil actions against the government. See, e.g., Bivens, McMillan, et al. v. Bentsen, et. al., District of D.C. Civil Case No. 93-1607. Mr. McMillan contends that he is being removed for philosophical bias. The court does not base its decision to exclude Mr. McMillan from service on his membership in BLAM! or what may be his philosophical bias against the government. Rather, the court is concerned about Mr. McMillan's participation in BLAM! only in the context of his conduct in filing and participating in numerous lawsuits which raise a conflict of interest with Customs and other governmental entities. The government is properly concerned that Mr. McMillan would reveal, or has revealed, his grand jury membership to other members of BLAM! and would, or at least could, use information learned in the grand jury to bolster his or BLAM!'s litigation against Customs.[1] The court shares this concern.

The government's motion was filed subsequent to Mr. McMillan's request that the United States Attorney issue subpoenas and the grand jury conduct an investigation into allegedly illegal conduct by Customs and its employees. Mr. McMillan contends that he is being removed for making this request, in violation of the Handbook for Federal Grand Jurors. The Handbook states in

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[1] At the June 24 hearing, the court continued the matter to June 28 to provide Mr. McMillan the opportunity to discuss with counsel the government's request that he testify as to whether he has revealed his grand jury membership to BLAM! Prior to June 28, the court and defense counsel received notice that the United States could not assure Mr. McMillan that he would not be prosecuted for contempt for revealing such information. As Mr. McMillan had noted that he would not take the stand without such assurances, the hearing was taken off calendar.

relevant part:

> . . . [T]he federal grand jury's function is to determine whether a person shall be tried for a serious federal crime alleged to have been committed within the district where it sits. Matters may be brought to its attention in three ways: (1) by the United States Attorney or an Assistant United States Attorney; (2) by the court that impaneled it; and (3) from the personal knowledge of a member of the grand jury or from matters properly brought to a member's attention. See Opposition Brief, Exh. M at 4 (emphasis added).

The court acknowledges that it is not inappropriate for a grand juror to have a personal agenda to prosecute crimes about which he has personal knowledge. However, that agenda becomes malignant when the grand juror has engaged in activities suggesting that he is preoccupied with a particular prosecution to remedy a wrong against himself. The court finds that such a situation exists here.

Therefore, upon consideration of the totality of circumstances presented to the court, the government's motion to permanently exclude Mr. McMillan from grand jury service is hereby GRANTED.

II. Motion to Seal all Records, Pleadings, and Hearings

The government has moved to seal all records, pleadings and hearings in this matter. Mr. McMillan has moved to keep them open. Prior to the June 24 hearing, the court requested briefing on the sealed nature of the hearing and later notified the parties that the hearing would be closed. The basis for the court's ruling is as follows.

Fed. R. Crim. P. 6 governs the secrecy of proceedings involving the grand jury. Rule 6(e)(5) provides that "the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury." "Matters occurring before a grand jury" includes the fact that Mr. McMillan is a member of Grand Jury

Panel 94-2. Disclosure of this information would leave Mr. McMillan vulnerable to possible coercion, influence, intimidation, or reprisal. See United States v. John Doe, Inc. I, 481 U.S. 102, 109 (1987); Matter of Special March 1981 Grand Jury, 753 F.2d 575, 578 (7th Cir. 1985). Furthermore, this hearing "affects" a grand jury proceeding because it affects the membership at that proceeding. Therefore, Rule 6(e)(5) applies and dictates that the court will seal the hearing.

Rule 6(e)(6) provides that records "relating to grand jury proceedings" also shall be kept under seal. For the same reasons stated above, the pleadings and other records in this matter "relate" to a grand jury proceeding and therefore shall remain sealed.

Rule 6(e)(2), the "General Rule of Secrecy," suggests that a court cannot impose an obligation of secrecy on a grand juror other than that he "shall not disclose matters occurring before the grand jury." Read narrowly, this rule would not prohibit Mr. McMillan from disclosing this matter, as it physically did not "occur" in front of a grand jury panel. However, given the rules of secrecy in parts (e)(5) and (e)(6), the court rejects a narrow interpretation of (e)(2). The court finds that the only way to read part (2) consistently with parts (5) and (6) is to read it broadly to prohibit disclosure of these proceedings.

In Re Oliver, 333 U.S. 257 (1948), does not support Mr. McMillan's position that this hearing should be open to the public. Unlike Mr. Oliver, Mr. McMillan is not on trial for criminal contempt. Furthermore, he is not a member of a class of persons unconstitutionally excluded from grand jury service. See e.g. Turner v. W.W. Fouche, 396 U.S. 346 (1970).

Therefore, for the reasons stated, the United States' motion to seal all records and hearings in this matter is GRANTED and Mr. McMillan's motion to open all records and hearings in this matter is DENIED. The records and hearings in this matter shall remain sealed indefinitely. Also, until this court's decision becomes final, Mr. McMillan is prohibited from disclosing this matter to anyone other than his counsel. If and when this court's decision becomes final, Mr. McMillan will not be prohibited from disclosing that he was a member of the grand jury and was removed pursuant to these proceedings. However, his obligation to keep secret matters that

occurred in the presence of the grand jury panel, such as testimony and panel membership, will remain intact.

III. Motion to Order Grand Jury Panel 94-2 to Reconvene

Mr. McMillan has brought a motion to order Grand Jury Panel 94-2 to reconvene. This Motion is GRANTED. The panel shall reconvene immediately, without Mr. McMillan. The court will not replace Mr. McMillan until such time that its decision becomes final.

IV. Motion to Order the U.S. Attorney to Cease Talking with the Grand Jury Foreperson Outside the Presence of the Jury.

Mr. McMillan has brought a motion to order the United States Attorney, and his Assistants, to cease talking with the grand jury foreperson outside the presence of the jury. The United States Attorney and his Assistant United States Attorneys should not communicate with the grand jury foreperson alone, except regarding administrative matters, such as scheduling. The court has insufficient information to make a finding whether this in fact has happened. However, as to future communications, Mr. McMillan's motion is GRANTED.

V. Motion to Open Records and Hearings

For the reasons stated in Part II above, Mr. McMillan's motion to open the records and hearings in this matter is DENIED.

VI. Motion to Order Assistant U.S. Attorney to Cease Talking About Mr. McMillan with Customs

Mr. McMillan has brought a motion to order Laura Birkmeyer, Assistant United States Attorney, to cease talking about Mr. McMillan's grand jury status with officials of U.S. Customs. The court lacks sufficient information to make a finding whether this in

fact has happened. However, as to future communications with Customs, this motion is GRANTED.

This order shall be sealed.

IT IS SO ORDERED

Dated: June 30, 1994 Rudi M. Brewster
UNITED STATES DISTRICT JUDGE

APPENDIX B

NOT FOR PUBLICATION
IN THE UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY NO. 94-2)	Filed February 2, 1996
)	Cathy A. Catterson
)	U.S. Court of Appeals
)	
SCOTT A. MC MILLAN,)	
)	
Respondent-Appellant,)	No. 94-55878
)	
v.)	D.C. No. 94-00239-RMB
)	
UNITED STATES OF AMERICA)	**ORDER**
)	
Petitioner-Appellee.)	**FILED UNDER SEAL**
)	

Before: POOLE, WIGGINS and RYMER, Circuit Judges.

We address a threshold matter which must be determined prior to any consideration of the merits of the case at bar. The precise issue presented is whether the district court's order dismissing a grand juror "for cause," pursuant to the Government's motion, is an appealable final decision within the meaning of 28 U.S.C. § 1291. We conclude that the district court's order is not reviewable on direct appeal under the "collateral order" doctrine. We further conclude that review under the All Writs Act, 28 U.S.C. § 1651 is similarly inappropriate. As such we lack jurisdiction to hear the instant appeal. Accordingly, we dismiss the case at bar without prejudice to the merits of Respondent's claims.